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## NATIONAL REGULATION OF RAILWAYS

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I am asked to prepare a paper upon national regulation of railways in the United States. There is none. There is state regulation to some extent, and national supervision which is of value. Regulation implies control; and there is and can be no control by the government over interstate transportation until some method is adopted to supervise and correct railway rates. It is to this proposition that I invite your attention.

Five years ago the crying evil in railway operations was discrimination, mainly discrimination between individual shippers. While many rates were too high, the general level was low; and in view of competitive conditions which had for some time and then existed, little apprehension was felt of any general unreasonable advance. Not so to-day. The vast consolidations of the past few years; the use of injunction to prevent departures from the published tariff; the lesson which railroad operators themselves have learned, that competition in rates is always suicidal, since it does not increase traffic and does reduce revenues,—these have largely eliminated that competition. The discrimination is disappearing, but in its place comes that other danger which always attends monopoly, the exaction of an unreasonable charge.

As the formation of these combinations has proceeded, the public has been repeatedly assured that there was no danger of any advance in freight rates. The absurdity of this has been evident from the first to all thinking

men, and is at last becoming patent to the unthinking. Less than one year ago Mr. Harriman, in testifying before the *Interstate Commerce Commission* as to the unification of interest in transcontinental lines, stated that the tendency of such consolidations was not to advance, but rather to reduce rates. Within the month the vice-president and chief traffic officer of another transcontinental line has declared in a published interview that all rates west of the Missouri River must be advanced 10 per cent, and to the same purport is the general utterance of railway authority elsewhere.

Louder than words speaks the thing done. In the winter of 1899 the grain rate from the Mississippi River to New York fell to 12 cents per 100 pounds; to-day it is 22½ cents. During the summer of 1902 the cost of carrying corn from the Middle West to the seaboard increased from 10 to 20 per cent over what it had been the previous season. Within this present month advances in grain rates have been put into effect which amount in all directions from 2 to 5 cents per 100 pounds, and these advances can now be made and maintained because the competition which formerly prevented has been placed under restraint.

Few people appreciate the significance of these slight increases. While almost nothing as applied to a single hundred weight, they are enormous in the aggregate. On the 1st of January the rate on grain from Buffalo to the seaboard and corresponding points is to be raised one cent per bushel. This slight advance, as applied to the average quantity of grain moving through Buffalo for the last ten years, would amount to \$1,500,000 annually. The *Interstate Commerce Commission* has just decided, after extended investigation, that a recent advance in rates on hay was unjustifiable and that the rate

should be restored. No attention has been or will be paid to this decision, since there is no way in which it can be enforced ; but let it be noted that the testimony in that proceeding shows that this increase costs producer and consumer in the territory to which it applies approximately \$2,000,000 annually. There are now pending before that Commission complaints for investigation which demand reductions aggregating perhaps \$15,000,000 annually—equal, upon a 4 per cent basis, to a capitalization of about \$400,000,000—nearly the railway capital of all the railroads of New England.

A still more important inquiry to the economic student of this subject is, Who pays these vast amounts and to whom are they paid? By way of answer to this we may consider the anthracite coal situation.

Within the last three years some sort of combination or arrangement between the six or seven railroads which carry from the mine all the anthracite coal in the United States has been effected by which competition, both in the mining and in the carrying, has been practically eliminated. The effect of this had been, before the breaking out of the last strike, to increase the price of this commodity in domestic sizes to the consumer from fifty cents to one dollar per ton, often more. At the same time, from July, 1898 to July, 1902, the stock of the Reading road alone, the largest coal mining and coal carrying factor, increased in value \$45,000,000—about 300 per cent. The present rate on anthracite coal from the mine to Washington, a distance of 240 miles, is \$2.00 per ton. Bituminous coal is carried corresponding distances in the West for \$1.00 per ton. Complaint is made that the rates now charged by these anthracite coal roads are extravagantly high in all directions. Without expressing any opinion that this is the case,

let us assume for a moment that the rate from the mine to the consumer is 50 cents a ton too great. About 50,000,000 tons are produced and marketed annually, and upon that theory someone is paying \$25,000,000 more than ought legitimately to be exacted. Who is that "somebody"?

Plainly it is not the producer, for the coal is sold f. o. b. at the mines, and the greater part of it is sold by the railways themselves. Equally plain is it that the buyer of that coal, the local dealer, does not suffer from the extravagant freight charge, for although he pays the money in the first instance, he adds his freight to the cost of his coal. Indubitably the consumer pays this charge. And who are the consumers of anthracite? The whole body of the people. It is the poor man's fuel; if by chance it is used to generate power for the movement of an electric train, still the poor man for the most part patronizes that train. This excessive tax in the ultimate analysis is paid largely by the poverty of this country.

And to whom is it paid? To the owners of railway stock, and they, generally speaking, are the rich and the very rich members of society. Many railway stocks are widely distributed. The cause of the widows and the orphans who own them is often touchingly presented by the attorneys of these railway operators; but, speaking generally, those stocks which profit by these combinations, by the excessive rates which these combinations can impose and maintain, are owned by the excessively wealthy. The widows and the orphans obtained but a small share of the \$45,000,000 which the manipulators of the common stocks of the Reading road have made.

All this is no reason why railway property should be treated unjustly. It simply shows that the railway, the

railway combination, is one of the most subtle and dangerous instrumentalities in effecting an unjust distribution of wealth by taking from the poor man wrongfully and giving to the rich.

Put alongside this the fact that these combinations have been effected and that this tax is imposed by *quasi* public servants, by corporations in the discharge of a public function and endowed by the government with extraordinary privileges in the discharge of that function. Read the words of that great constitutional lawyer, Mr. Justice Bradley, in speaking of the right to control railway charges: "But a superintending power over the highways and the charges imposed upon the public for their use always remains in the government. This is not only its *indefeasible right*, but is necessary for the protection of the people against extortion and abuse."

Let it be further noticed that the remedies for monopoly which are just now occupying the public attention have been already tried here and failed. The act to regulate commerce insures the widest publicity for all the operations of railways, but that has not and cannot prevent the imposition of unreasonable rates. Some years ago the Supreme Court of the United States decided that the Sherman Anti-Trust Law applied to the operations of inter-state railways, and forbade all agreements between them for the establishment or maintenance of rates. It was believed at the time that this was a deliverance from railway monopoly. Its only effect so far has been to intensify that monopoly.

Mr. Harriman, in his testimony previously referred to, suggested that the public was protected by the fact that any shipper could sue and recover what he had paid beyond a reasonable rate. Apply this to the coal situation. The dealer pays the freight, but he will not sue,

for he can recoup himself from his customer. The consumer himself cannot sue, for he pays no freight ; but even if he could, what remedy would be afforded by the right of each individual to recover at the end of a lawsuit from two to fifteen dollars per year ?

To-day with respect to interstate transportation, and that is the great body of all transportation, the public has no safeguard against railway monopoly. It should have, and there can be but one. In some manner just to all parties the government must exercise its right to supervise the rate, must compel these carriers to impose in the first instance a reasonable charge. The real question is, By what means shall this be accomplished ?

It cannot be done through the courts. The functions of our government are divided into the executive, the legislative, and the judicial, and these functions must, under the Constitution, be kept separate. The Supreme Court of the United States has determined that the prescribing of a railway rate for the future is not a judicial function and cannot be discharged by the courts ; that it is legislative and must be exercised either by the legislature directly or by some commission created by the legislature. It will hardly be suggested that Congress could directly supervise the interstate railway rates of this country. Hence the only practical method is by the use of a commission. I am not discussing now the powers of the Interstate Commerce Commission. There is too little of that power to admit of intelligent discussion. I wish rather to inquire what should be done if no such body were in existence.

Such a commission should not make interstate railway rates. So long as railways are private property they should have the right to name their rates in the first instance, to determine what competitive conditions they

will meet, what industries they will foster, what will be, in general, the policy of the road. When those rates have once been made the government should inquire whether they are just and reasonable, and if found unjust and unreasonable should change them.

Such a tribunal is not a court. The court is for the trial of causes. A commission should go further and investigate as well. In court the plaintiff presents his complaint, the defendant makes his answer, the parties produce their proofs, and the judge and jury hear them and decide the issue. That issue usually concerns only the immediate parties to the trial. Not so with these rate questions. They almost invariably touch the whole community as well as some individual complainant, and it is unreasonable to expect that a single individual will sustain the burden of prosecution for the benefit of all. Look once more at our coal rate. The number of dollars which this excessive charge would take from the ordinary consumer is insignificant ; but the issue to the carrier is of enormous consequence, and would be bitterly contested. Is it reasonable to expect that a single consumer will bear the burden of litigating that question, first before a commission, then before some appellate body, and finally before the Supreme Court of the United States ? It is clear to my mind that the government itself, which represents the whole public, should assume the burden of that trial. The commission must be, in a way, both an investigating and a deciding body.

Note another most important difference. A court administers the law as it is laid down in statute or in precedent, the jury decides the fact upon the testimony of witnesses. Not so the commission. Here is no precedent to be administered. No dispute generally arises as to the facts. The question is, What under these ad-



mitted conditions shall be done? and this question is largely one of judgment.

Such a commission should be an expert body, composed of the best men obtainable, and occupied entirely in the consideration of such matters. It should obtain the fullest possible information. It should hear all any one desires to say, but when this has been done its conclusion must still rest in the good judgment of its members. Its decision is the act of an expert body; and just in proportion as the members of that body have had experience, just in proportion as they are men of honest, mature, and independent judgment, so is that decision of value.

There can be little difference of opinion up to this point. The really difficult question is, How shall the orders of the commission be reviewed and enforced? The railway rate is private property. Any unjust reduction of that rate is an unjust taking of private property. The railway industry is with but one exception the largest industry, and without exception the most important industry in our country. Any unjust interference with it, or any unreasonable embarrassment of it, would be both wrong and foolish. A commission like that suggested, which is at once an investigating and a deciding body, may be to an extent partisan. The questions passed upon are of tremendous importance. Some method ought to exist by which possible mistakes upon its part could be corrected.

Such security is already provided to an extent by the Constitution of the United States. The Supreme Court has held that the fourteenth amendment prohibits upon the part of a state (it would probably be the same in the case of the United States) the putting in by the government of a rate so low as to deprive the holders of rail-

way securities of their property without just compensation; and this clearly prevents the possibility of imposing such rates as amount to a practical confiscation of property. However, there might be rank injustice far short of confiscation; and while this remedy may, under future construction by the court, turn out to be an adequate one, the general feeling is that some additional protection should be provided.

The court cannot prescribe a rate for the future, but it may determine whether that rate, when fixed, is reasonable; and the suggestion hitherto has been to permit the federal courts to review and set aside, if found unreasonable, the orders of the commission. It is very doubtful whether any such system can ever give satisfactory results, for the reason already stated. These questions are not of a judicial nature, and cannot be intelligently passed upon by courts. Federal judges are not selected for that purpose. Most of them have absolutely no experience in such matters. Their time is fully occupied with their proper duties, and the very nature of those duties in a measure unfits them to appreciate these questions. As well might it be provided that courts shall enforce the laws enacted by Congress, if such laws are, in their judgment, reasonable and just. When the English government had under consideration some method of regulating its railways, Parliament addressed to the judges of last resort an inquiry as to whether that duty could be properly undertaken by the courts, to which all but one responded in the negative. It is my belief, founded on experience and reflection, that any system of regulation, however excellent in other respects, which gives the federal courts power to suspend and finally set aside the orders of a commission must be of doubtful value.

For these reasons it has long seemed to me that we must create a new tribunal, in the nature of a commerce court, to deal specially with these questions—a tribunal with judicial attributes, but discharging the combined functions of court and commission, as does the English Railway Commission to-day. Some scheme of this nature appears to furnish the only rational solution of this difficult problem.

First. Whatever body enforces the orders of a commission must make decrees and execute process. A commission itself cannot be invested with these powers; the special court suggested could be.

Second. A commission whose members hold office for limited terms is not permanent in its personnel, and might be subject to influences of a sectional or political nature. This is often suggested as a reason why the great power involved in the right to control railway rates should not be given to such a body. The members of a tribunal like that suggested would hold office for life, would possess all the conservatism and independence of judges, and would afford to railway property the protection thereby assured.

Third. The main objection to intrusting this duty to the present courts is that the questions involved are not properly law questions. The thing to be reviewed is the judgment of an expert *quasi* legislative body. The review of such a judgment is not a judicial function. The attempt to make it one must result in dissatisfaction and confusion. A court like that suggested would be occupied mainly in the consideration of such matters, and would become even more familiar with them than the commission itself.

Fourth. Such a court would be able to act promptly; and this is the essence of regulation, especially railway

regulation. These are not lawsuits, where interest or increased damages can make good to a plaintiff the lapse of time. When the wrong has been once inflicted it never can be righted. If there were no other reason for not committing this task to the present courts, the interminable delays attendant upon that mode of procedure would be a sufficient one.

It may be objected that such a court would not be sufficiently occupied. My own impression is that after a little it would be. A commission charged with regulation of the interstate railway traffic of this country and having any real power to make enforceable orders would necessarily render very many decisions. The duties of a commerce court would not, however, be confined to reviewing and enforcing such orders. Matters arise daily which can only be properly dealt with through the summary process of a court. Such a tribunal might also be available in dealing with monopoly in other branches of interstate commerce as well as railway transportation.

What I desire to emphasize, however, is not the method, but the fact that in some way the government must determine whether railway charges are reasonable, and if not, make them reasonable. And in conclusion let me ask what objection can be urged against this proposition? Various objections are urged, depending largely upon the audience to which those objections are addressed.

It is said, for instance, that these questions will settle themselves; that in the grand march of human progress these things will somehow all come out right. Just what right may be, or just why the future is to be more nearly right than the present, or for what reason a thing which is wrong should not be corrected now, is *not*

stated. Sometime since I fell into conversation with a distinguished apostle of this doctrine. He is a great student of the railroad problem, upon the railroad side, and a most voluminous writer upon that side. After some discussion, in the course of which he admitted the existence of many evils, I said to him, "Doctor, you admit that these evils do exist; now what is your remedy?"

"Sir," replied the Doctor, "I rely upon the *interaction of the correlated forces*."

Good! If the coal combine squeezes you, turn on the forces, and be certain they are correlated.

It is also said that the making of a rate is a matter of such delicacy that only the expert traffic manager can deal with it. One would almost fancy that freight rates were made as birds build their nests,—by instinct,—and that the entire quantity of rate-making instinct was already monopolized by the railways. Very recently one of these gentlemen testified before the Interstate Commerce Commission that in his opinion all rates were too low. The last annual report of his company shows that it earned during the year ending June 30, 1902, interest upon its funded debt, a dividend of 7 per cent upon its preferred stock, and nearly 12 per cent upon its common stock, although it paid only 6. I cheerfully concede the distinguished ability of that gentleman. I do not concede that whether the territory served by the 7000 miles of railway over whose traffic operations he presides shall pay 12 per cent or 25 per cent to his stockholders must rest entirely in his judgment.

It is urged that the self-interest of the railway is a sufficient protection to the shipper; that in order to provide traffic the interest of the carrier requires it to establish and foster industries. To an extent this is true, and

for that reason I have already said that the railway should be allowed in the first instance to name its own rate; but the same self-interest which induces that carrier to establish the industry at first induces it to take the last penny possible when established. Self-interest should be allowed free play until it becomes rapacity; then it must be checked.

It is earnestly insisted that the freight rate is a commercial proposition which must be left to the laws of commerce, with which the government cannot safely meddle. You will remember that the carriers have recently advanced rates on grain and grain products in all directions, among others  $2\frac{1}{2}$  cents from Chicago to New York. Some two weeks ago the Commission began an investigation into that matter, and examined two witnesses, both traffic managers of leading lines. One said that he made the advance because his president directed him to, the other because he was told by his executive officers that they must have more money. The only commercial proposition at the bottom of these advances is the proposition that the producers and consumers of grain shall pay to the stockholders of these railways several millions of dollars more annually than has hitherto been paid.

It all comes to this: Railway transportation is to-day a monopoly. This you cannot prevent. You can control the monopoly by controlling the charge which it exacts. This should be done wisely and carefully, but it must be done.